

FILED

April 26, 2022

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXASIN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISIONBY: CV
DEPUTY

JENS H.S. NYGAARD,

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Plaintiff,

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Case No. 6:20-cv-00234-ADA

v.

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FÉDÉRATION INTERNATIONALE DE
L'AUTOMOBILE, FORMULA ONE
MANAGEMENT LTD., FORMULA ONE
WORLD CHAMPIONSHIP LTD.,
MERCEDES-BENZ GRAND PRIX LTD.,
DAIMLER AG, RED BULL TECHNOLOGY
LTD., RED BULL RACING LTD., FERRARI
S.P.A., and DALLARA AUTOMOBILI S.P.A.,

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Defendants.

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JURY TRIAL DEMANDED

**SUPPLEMENT TO DEFENDANT FÉDÉRATION INTERNATIONALE DE
L'AUTOMOBILE'S MOTION FOR SUMMARY JUDGMENT (ECF NO. 180)**

Defendant Fédération Internationale de l'Automobile ("FIA") files this supplement to its motion for summary judgment that independent claims 1 and 4 of U.S. Patent No. 7,949,178 (the "178 Patent") are invalid for lack of an adequate written description (ECF No. 180).

As set forth in the FIA's summary judgment motion, the following limitations in claims 1 and 4 lack an adequate written description: (a) "form of a triangular prism which has been sheared in a vertical plane" and (b) "form of a truncated sheared triangular prism." The depositions of Mr. Nygaard, and his technical expert, Stephen Syson further confirm that the form limitations in claims 1 and 4 lack an adequate written description. *See Biogen Int'l GmbH v. Mylan Pharms., Inc.*, 18 F.4th 1333, 1343 (Fed. Cir. 2021) (considering inventor testimony in the written description analysis); *Noven Pharms., Inc. v. Amneal Pharms. LLC*, C.A. No. 18-699-LPS, 2020 WL 11191445, at *38 (D. Del. Sept. 4, 2020) (same).

In his deposition, Mr. Nygaard conceded that the form limitations were drafted by his attorneys, and he did not (at least initially) understand what those limitations meant:

Q. And earlier you said you were surprised by the language that they used for the shapes in claim 1.

A. Yes.

Q. Did you not believe that those shapes were part of your invention?

A. I believe those shapes were part of my invention. But I had to look up a few words.

Q. Okay.

A. Like sheared and truncated.

Nygaard Dep. Tr. (Sept. 14, 2021) at 50:9-17 (Ex. 1); *see also id.* at 40:25-41:11.

Mr. Nygaard was also unable to determine whether a particular figure from his own patent had the form of a vertically sheared triangular prism or a truncated sheared triangular pyramid:

Q. Okay, so in figure 8 strengthening member 2 has the shape of a truncated pyramid, is that correct?

A. I don't know.

Q. Does it have the shape of a triangular prism?

A. I don't know.

Id. at 30:6-10; *see also id.* at 44:8-12.

Nor could Mr. Nygaard determine whether particular strengthening members satisfied the form limitations:

Q. Does this prototype in this photograph take on the form of a triangular prism that has been sheared in the vertical plane? Yes or No.

A. I don't know.

Q. Does this prototype in this photograph take on the form of a truncated sheared triangular pyramid? Yes or No.

A. I would say I don't know.

Nygaard Dep. Tr. (Sept. 15, 2021) at 140:6-12 (Ex. 2); *see also id.* at 141:25-142:5.

Both Messrs. Nygaard and Syson also acknowledged the form limitations’ inherent lack of substance. For example, although the pyramid and prism elements are distinct limitations, Mr. Nygaard admitted that they do not necessarily cover different shapes:

Q. So the same shape can satisfy both a triangular prism which has been sheared in a vertical plane and a truncated sheared triangular pyramid, is that correct?

A. In principle. The principal drawing, yes.

Id. at 46:2-5.

Similarly, Mr. Syson admitted that there was no difference between a sheared truncated triangular prism and an unsheared truncated triangular prism:

Q. And, in fact, any truncated pyramid that you drew, you could always select any surface and show that some of it had been sheared off correct and it would still meet the claim limitation; isn’t that correct?

A. I think if you—yeah, if you do it from a practical perspective you probably could.

Syson Dep. Tr. at 124:1-10 (Ex. 3) (objection omitted). When asked whether “every truncated pyramid would satisfy this form limitation,” Mr. Syson claimed that the shape would need to be adapted to the vehicle to protect the driver from impacts and rollovers, but ultimately agreed with the statement. *Id.* at 124:22-125:12. Mr. Syson also admitted that there was nothing in the specification describing how the shape of the strengthening member needed to be adapted to the structural requirements of the vehicle in which it was installed. *See id.* at 125:14-23.

The testimony of Messrs. Nygaard and Syson confirms that the form limitations in claims 1 and 4 are completely indeterminate and a skilled artisan could not “visualize or recognize the identify of the subject matter purportedly described” in the ’178 Patent’s specification. *See Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 323 F.3d 956, 968 (Fed. Cir. 2002). Therefore, claims 1 and 4 of the ’178 Patent are invalid for lack of an adequate written description.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the FIA's opening and reply briefs on this motion, the FIA respectfully requests that the Court grant summary judgment that claims 1 and 4 of the '178 Patent are invalid for lack of an adequate written description.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above document was served on all counsel of record via the Court's CM/ECF system on April 22, 2022.

/s/ Claudia Wilson Frost
Claudia Wilson Frost